No. 19646

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN MILTON PHILLIPS, JR.,
JACK CECIL CHERBO and
RICHARD DALE WALKER,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT WALKER'S REPLY TO APPELLEE'S PETITION FOR A REHEARING

Appeal from the United States District Court for the District of Oregon

HONORABLE JOHN F. KILKENNY, Judge

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1. There is nothing in the record to substantiate the government's contention that the defendant Cherbo by his own testimony had notice that ". . . the advertising

of the venture was being misunderstood . . ." He had seen some letters wherein purchasers had cancelled, but there is nothing to show that these were not from purchasers who had just changed their minds, felt they couldn't afford it, or made other investments, etc. It cannot be said that Ex. 968 and 984 were cumulative since there is no evidence as to the type of documents he had seen before. A mere reading of 968-82 shows that it is anything but harmless. Finally, if the government's position were one hundred per cent correct instead of one hundred per cent wrong, it would have no effect upon the reversal of the defendant Walker's conviction. The exhibits could hardly be said to be merely cumulative as to him, as there is no evidence he had ever seen or heard of any documents even remotely resembling these exhibits, which were erroneously received as to him.

2. The government claimed for the first time on appeal that the exhibits were relevant and admissible not to show knowledge and notice to these defendants, but allegedly as evidence of overt acts, i.e. the receipt and handling of correspondence, by persons claimed to be co-conspirators. The fact is, the evidence was offered at trial for *one purpose only,* i.e. in an effort to show knowledge of these appellants, and no other. The jury was instructed that the exhibits were to be used for one purpose, determining knowledge and no other. (The vice of that instruction was that the jury was not told that substantial evidence of actual knowledge would be required.) The government's so-called alternative ground

for admission referred to in its brief at page 65, did not merit any treatment in the opinion.

3. Appellee's fear that the decision has eviscerated the offense of conspiracy is groundless. The opinion of the court has not altered, by so much as one iota, the law of conspiracy. The ruling of this court has not modified the rule that the act of one conspirator is chargeable to another. That principle was never in issue. The government has apparently never grasped the problem. First you start with certain documents (968 and 984) which in and of themselves cannot be offered to prove the truth of matters contained therein. We know that in certain circumstances they can be offered to show the actions, if any, or inactivity after one has knowledge of them. In other words, to make them admissible the defendants had to know of them. In this case the government was attempting to show that these appellants knew of them because others, allegedly co-conspirators, knew of them. It was this attempt the court quite properly thwarted. The case of *Ingram* v. *U. S.*, 360 U.S. 672 (1958) compelled such a result. Further, it is not true that these appellants are in the position of Ingram and Jenkins. Ingram and Jenkins were the ones with knowledge. Smith and Law did not have knowledge. The appellants did not have knowledge. Knowledge could not be constructively imputed to Smith and Law, and it could not be imputed to these defendants.

4. The court's opinion does not detract in the slightest from the authority of *Mathes and Devitt Federal Jury Instructions, Civil and Criminal.* Those instructions upon conspiracy, relating to the acts of one con-

spirator being charged to another, are still accurate and conform to the law. There are no instructions to be found therein regarding the use to which a jury could put the type of documents involved in this case.

5. The appellants were in fact, not "in charge" of the files of any corporation. This was recognized by the court (Tr. Vol. III, p. 361). They lived thousands of miles from the files in question. The case of *Edwards* v. *U. S.*, 334 F.2d 361 (5th Cir., 1964) turned upon the fact that a rebuttal presumption existed (knowledge of the law), which shifted the burden of going forward. Had this appellant been advised *at trial* that some new presumption was being created, in addition to excepting to such a determination, he could have gone forward to prove his lack of knowledge.

It would appear that the court has not been presented with any substantial reason for granting a rehearing.

Respectfully submitted,

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Attorneys for Appellant
Richard Dale Walker

CERTIFICATE OF COUNSEL

I certify that, in connection with the presentation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM E. HURLEY

Of Attorneys for Appellant
Richard Dale Walker